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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 538

D. C. CARTER, a/k/a JOHNNIE CARTER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

D. C. CARTER, a/k/a JOHNNIE CARTER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Fourth District, entered in the above-entitled cause on the 21st day of December, 1966, which the Supreme Court of Florida refused to review on the 5th day of April, 1967, upon the ground of lack of jurisdiction, when Petitioner filed therein a Petition for Writ of Certiorari.

CITATIONS TO OPINIONS BELOW

1. *D.C. Carter, a/k/a Johnnie Carter, Appellant v. State of Florida, Appellee,* (4 D.C.A., Fla. 1967) 193 So.2d 215.
2. *D. C. Carter, a/k/a Johnnie Carter, Petitioner v. The State of Florida, Respondent,* In the Supreme Court of Florida, January Term, A.D. 1967, Case No. 36,077, ___ So.2d__, (Not reported) Please see accompanying certified copy of record.)
3. *Danford v. State* (Fla. 1907) 43 So. 593.
4. *Pell v. State,* 97 Fla. 650 (1929) 122 So. 110.
5. *Hedges v. State,* (Fla. 1965) 172 So. 824.
6. *Watkins v. State* (4 D.C.A., Fla. 1967) 197 So.2d 312.

JURISDICTION

The Supreme Court of the United States has jurisdiction of the District Court of Appeal of Florida, Fourth District, herein under the provisions of Section (3) of Title 28, Section 1257, United States Code. The trial court deprived petitioner of a vital and substantial right in refusing to give to the jury a requested instruction, warranted by the facts and required by the law of Florida following standard instructions as to self-defense, that there is a common law duty to "retreat to the wall" when one is attacked, but there is no such duty when one is assaulted in his own home or immediately surrounding premises. The Court erred in not directing the attention of the jury to this substantive law when petitioner was on trial upon a charge of murder in the first degree and lesser included offenses and thus deprived petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether petitioner has been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States.

2. Whether the decision of the state Courts is sustainable on an adequate and independent, non-federal ground.

FLORIDA CONSTITUTIONAL ARTICLE INVOLVED

1. Article 5, Section 4, Constitution of Florida.

STATEMENT

1. Petitioner was tried upon an indictment charging murder in the first degree of one William Henry Harrell in the Circuit Court of St. Lucie County, Florida. He was found guilty of the lesser included offense of manslaughter and, upon being adjudged guilty, was sentenced to be imprisoned for a term of six (6) months to fifteen (15) years.

Upon appeal to the District Court of Appeal of Florida, Fourth District, the judgment and sentence were affirmed.

Application was thereupon made for a Writ of Certiorari in the Supreme Court of Florida to the District Court of Appeal of Florida, Fourth District, under Article 5, Section 4, of the Constitution of Florida. This application was denied upon the ground of a lack of jurisdiction.

2. On the afternoon of the 23rd day of August, 1965, petitioner was sitting on the front porch of his own home talking to Alice Suggs, a friend of his wife, Sarah Bell. All parties to the occurrences were Negro citizens. He had his shirt and shoes off, relaxing and visiting (T. 590-591). The deceased, accompanied by his common-law wife, Margaret Harrell, drove up in front of the petitioner's home, parked on the West side of the street, headed North on the wrong side of the street (T. 591). The deceased called Alice Suggs and asked if the petitioner was there. She replied in the affirmative. The deceased then called to petitioner to bring his "damn _____ out there" and do it now. Petitioner asked the deceased and Margaret Harrell to come in (T. 592). Deceased demanded that petitioner come out in his yard to the truck (T. 592). Petitioner went into the house to get his shirt and shoes (T. 262). After being warned by Alice Suggs and putting on shirt and shoes, petitioner picked up his pistol,

which he had had for two (2) years from a dresser drawer and placed it in his belt (T. 593). Petitioner walked into his own yard to a point about five (5) feet from the driver's door of the truck and asked deceased to come into the house (T. 503). Deceased accused petitioner of telling lies on him which petitioner denied (T. 594). Deceased called petitioner a Goddamn liar (T. 594). Petitioner pleaded with deceased (T. 595). Deceased stated "I am going to either kill you or you will kill me" (T. 595). Deceased slammed open the door of the driver's side of the truck and started toward Petitioner (T. 596). Deceased was a young man of huge stature and strength (T. 583). Petitioner was a man of fifty-seven (57) years of age, about five feet three or four inches tall, and weighed about 160 pounds (T. 579). Deceased was coming out of the truck toward petitioner as fast as he could get out (T. 596). Petitioner emptied his revolver and it snapped, empty, once or twice (T. 596). Five shots were fired (T. 599-600). Three bullets struck deceased (T. 441-446). Another bullet struck the inside of the right (passenger) door of the truck (T. 433, 505). The other bullet went from the inside of the truck through the glass in the cab of the truck (T. 506). The car of Alice Suggs, parked on the same side of the street and facing the truck, was within a few feet of the deceased's pick-up truck (T. 277). Alice Suggs was sitting in her car at the time the shooting took place (T. 2[illegible]). She, a witness for the State of Florida, saw petitioner run between the front of the truck and her automobile and, then, run North to the back end of her car (T. 277-278). No more shots were fired (T. 283-285). William Henry Harrell was taken to the Fort Pierce Memorial Hospital, Fort Pierce, Florida (T. 602-604) where he was treated in the emergency room (T. 192). He died before he could be taken to surgery (T. 193).

While Margaret Harrell testified to the contrary, the photographic exhibits admitted into evidence, particularly State's Exhibit No. 11 and Petitioner's Exhibits No. 7, 5, 10, 8, 14, 9, 21 and 22, establish without question that the testimony of the State's witness, Alice Suggs, and petitioner's witnesses,

Ancil Tucker, a white insurance agent, Arden Baker, a professional photographer, and the petitioner, D. C. Carter, was true and that all five (5) shots were fired by petitioner while standing in his own front yard a few feet from the left door of the pick-up truck of the deceased.

At the conference between the trial court and counsel as to requested jury instructions to be given to the jury or denied the following statements were made (T. 485-487):

> "THE COURT: I will give that one. Now we will take up number 1, styled: 'Further Additional Requested Jury Instructions by the Defendant.'
>
> MR. FORD: Yes, sir.
>
> THE COURT: 'The Court instructs you, gentlemen, that if, while one is lawfully on his own premises, another advances in a threatening manner and under such circumstances that the former believes and has reason to believe that he is in danger of losing his life or of suffering great bodily harm, he is not obliged to retreat but may stand his ground and meet any attack made upon him in such a way and with such force as under all the circumstances he at the moment believes and has reason to believe is necessary to save his life or to protect himself from great bodily harm..
>
> MR. STEED: We object to that, Your Honor, because there is no basis in the evidence for that instruction, because there is no evidence that the deceased advanced onto the premises of the defendant, which is contemplated in that instruction.
>
> MR. FORD: In answer to that, if the Court please, there is evidence. There is the evidence of the defendant himself. There is the evidence of the witness Alice Suggs, who was brought here by the state, for whom they are responsible, and who testified befor this Court that he did open the door and started out into the yard after the defendant, and that there is certainly no line where you can say the man –
>
> THE COURT: Did she testify that he started out in the yard?

MR. FORD: That he started out of the truck.

MR. TYE: Yes, sir.

THE COURT: But into the yard?

MR. FORD: No, she didn't testify to that. She testified similarly to the defendant, that he opened the door and that he started out on the side where Carter was, which would, of course, be on Carter's property, and there is no set line of demarcation when a man is making an advance onto the property of another, or onto a defendant. Certainly this would qualify in this case. We feel that this charge fits the evidence exactly. It is basic and vital to the defense, and we feel that in all fairness it should be given. That is a question for the jury to determine if the Court please, as to whether or not he was advancing onto the property, whether he was advancing on the defendant, and certainly there is evidence to back up every element of this charge.

THE COURT: I don't believe that the evidence justifies giving this charge and I will deny it."

The question of lack of due process under the Constitution of Florida, and under the Fourteenth Amendment to the Constitution of the United States, by the failure of the trial court to give the above-quoted requested instruction under the facts of this case, was raised, among other questions, upon the appeal to the District Court of Appeal of Florida, Fourth District, in the assignments of error, briefs, and oral argument of counsel. The position taken by petitioner that the trial court invaded the province of the jury in determining the facts and, in denying the instruction, in denying petitioner a substantial right was, in effect, an allegation of a lack of due process of law under the Federal and State Constitutions. The District Court of Appeal of Florida, Fourth District, entered a Per Curiam Opinion, affirming the judgment and sentence. The Supreme Court of Florida denied jurisdiction upon application for a Writ of Certiorari herein.

REASONS FOR GRANTING WRIT

As to First Question:

1. Petitioner has been deprived of a substantial right, based upon real evidence, to have the jury fully instructed as to the laws of Florida applicable to the charge. (*Calton v. Utah*, 130 U.S. 83, 9 S. Ct. 435); and (*Bird v. United States*, 180 U.S. 356, 21 S. Ct. 403).

2. Doubt as to the adequacy of instructions in a capital case should be resolved in favor of accused. (*Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880).

3. Instructions which leave the jury to pass upon vital questions of guilt of a person charged with homicide, without reference to his evidence (that he was on his own premises), are erroneous when he himself has testified to his own belief that his life was in danger, and to the facts that led him so to believe. (*Bird v. United States*, 180 U.S. 356, 21 S. Ct. 403).

4. A charge as to self-defense should not ignore evidence that defendant was armed to hunt (was on his own premises with no duty to retreat). (*Allison v. United States*, 160 U.S. 203, 16 S. Ct. 252).

5. The Courts of the State of Florida have clearly failed to apply the laws of Florida, as set forth herein, in this case and have deprived petitioner of a substantial right and of his liberty by such failure.

6. Petitioner, as a citizen of the United States, has exhausted every remedy in the Courts of Florida and is without remedy except to claim his Federal Constitutional rights in this Honorable Court.

7. State judicial determinations should not be final where fundamental Constitutional rights of citizens are involved to the extent that a fair trial has not been afforded petitioner. (*Townsend v. Sain*, 372 U.S. 293 (1963); and (*Henry v. Mississippi*, 379 U.S. 443 (1965).)

As to Second Question:

1. The decision of the District Court of Appeal of Florida herein is not sustainable on any adequate and independent, non-federal ground since it is directly contrary to and in direct conflict with decisions of the Supreme Court of Florida and with its own decision in another case.

Petitioner offered and the evidence established that petitioner killed the deceased in self-defense upon his own residence property (his home), the trial court refused to give to the jury, in addition to the standard instructions as to self-defense which it gave the additional requested instruction quoted hereinabove. In *Hedges v. State*, (Fla. 1965) 172 So.2d 824, it had been held:

> "Where court in homicide case in which killing had occurred in defendant's home instructed that accused, to justify taking of human life, must have used all reasonable means within his power and consistent with his own safety to avoid danger and avoid necessity of taking human life, rule of non-necessity of retreat in one's own home should have been included."

This decision followed or quoted from *Pell v. State*, 97 Fla. 650 (1929) 122 So. 110; and *Danford v. State*, (Fla. 1907), 43 So. 593.

The District Court of Appeal of Florida, Fourth District, affirmed the judgment and sentence in this cause on December 21, 1966, disregarding the precedent authorities cited above. It denied a rehearing in this cause on the 20th day of January, 1967, and, yet, reversed the trial court in the case of *Watkins v. State*, (4 D.C.A. Fla.) April 6, 1967, 197 So.2d 312, upon the same point of law, holding:

> "Refusal to give defendant's requested instruction, in prosecution for murder of defendant's common law husband in dwelling in which parties resided, relating to her right of non-necessity of retreat when attacked in her home was prejudicial

error." (Citing *Baugh v. State*, (1927), 215 Ala. 619, 112 So. 157, 159).

2. Article 5, Section 4, of the Constitution of Florida, authorizes the Supreme Court of Florida to review by certiorari any decision of a district court of appeal, among other things, that is in direct conflict with a decision of another district court of appeal or of the Supreme Court of Florida on the same point of law. Yet, upon application for a writ of certiorari in this case, it denied that it had jurisdiction to consider the direct conflict.

CONCLUSION

It should, therefore, be concluded that:

1. Petitioner has been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner has thereby been denied a substantial right, contrary to the laws of Florida and the Constitution of the United States, by reason of which he has been convicted and sentenced to an indeterminate imprisonment up to fifteen (15) years.

3. The decision of the District Court of Appeal of Florida, Fourth District, herein is not sustainable on any adequate and independent, non-federal ground. It is in conflict with its own subsequent decision, upon the same point of law, herein cited.

4. The Supreme Court of Florida denied jurisdiction to consider petitioner's application for a writ of certiorari which it clearly had under Article 5, Section 4, Constitution of Florida.

5. The decision of the District Court of Appeal of Florida, Fourth District, herein, should be quashed and such other relief as shall seem right and proper should be granted.

Respectfully submitted,

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RAYMOND E. FORD
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Fort Pierce, Florida 33450

Attorneys for Petitioner

Dated: August 28, 1967

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 1967, I served a copy of the foregoing PETITION FOR A WRIT OF CERTIORARI upon the following counsel of record:

By United States Airmail:

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Attorney for Respondent
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By: Errol S. Willes
Of Counsel

APPENDIX 1

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM, 1966

D. C. CARTER a/k/a
JOHNNIE CARTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 611.

Opinion filed December 21, 1966.

Appeal from the Circuit Court for St. Lucie County; Wallace Sample, Judge.

Raymond E. Ford of Ford & Tye, Fort Pierce, for appellant.

Earl Faircloth, Attorney General, Tallahassee, and Fred T. Gallagher, Assistant Attorney General, Vero Beach, for appellee.

PER CURIAM.

We have carefully reviewed the record on appeal and the respective briefs of the parties and find that the appellant has failed to show reversible error.

Affirmed.

ANDREWS, Acting C. J., LILES, WOODIE A., and NANCE, L. CLAYTON, Associate Judges, concur.

APPENDIX 2

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM, 1967

D. C. CARTER a/k/a
JOHNNIE CARTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee

CASE NO. 611

20 January 1967

ORDERED that appellant's petition for rehearing, filed 5 January 1967, is hereby denied.

A TRUE COPY
THOMAS THATCHER, CLERK
/s/ Stephanie M. Petrulak
By: Chief Deputy Clerk
cc: Ford & Tye
Fred T. Gallagher, Esq.

APPENDIX 3

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
April 5, 1967

D. C. CARTER, a/k/a JOHNNIE CARTER,
Petitioner,
v.
THE STATE OF FLORIDA,
Respondent.

CASE No. 36,077
District Court of Appeal, Fourth District

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A TRUE COPY

TEST:

/s/ Sid J. White
Clerk Supreme Court

cc: Hon. Julia Maddox
Hon. Roger Poitras
Messrs. Ford & Tye
Hon. Fred T. Gallagher

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 538

D. C. CARTER, a/k/a
JOHNNIE CARTER,
Petjtioner,
v.
STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 538

D. C. CARTER, a/k/a
JOHNNIE CARTER,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

BRIEF OF RESPONDENT

OPINIONS BELOW

The Opinion of the District Court of Appeal of Florida, Fourth District, and the Opinion of the Supreme Court of Florida have previously been attached to the petitioner's Petition for Writ of Certiorari as Exhibits 1 and 3.

JURISDICTION

The respondent respectfully submits that the Su-

preme Court of the United States does not have jurisdiction in the instant case of the District Court of Appeal of Florida, Fourth District, under the provisions of Section (3) Title 28, Section 1257, United States Code, as the validity of a treaty or statute of the United States was not drawn in question; nor was the validity of a State statute drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States; nor was petitioner deprived of any title, right, privilege, or immunity as is specifically set up or claimed under the Constitution, treaties, or statutes of, or commissions held, or authority exercised under the United States. This will be further substantiated in the Argument section hereinafter set forth.

QUESTIONS PRESENTED

1. Whether petitioner has been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States?

2. Whether the decision of the State Courts is sustainable on an adequate and independent, non-federal ground?

STATUTES AND CONSTITUTION INVOLVED

Article 5, Section 4, Constitution of Florida.

STATEMENT

1. Respondent will adopt, as its opening statement, that portion of the Statement as contained in petitioner's brief under paragraph number 1.

2. Petitioner, in his Statement, has basically set forth in paragraph number 2 the testimony of petitioner during the trial, and we see no need to repeat it here. However, certain inconsistencies should be pointed out, and additional testimony should also be brought to the attention of this Court, which we will now do.

Margaret Harrell, common-law wife of the deceased, testified that the petitioner fired the first three shots while the deceased was in the truck (T 200, 201). The deceased then got out of the truck on the right-hand side and tried to crawl under it (T 202), whereupon the petitioner came around the truck and fired two more shots at the deceased (T 203). While the petitioner was reloading his gun, the deceased got up and ran to an apartment across the street (T 207), whereupon the petitioner, with the gun still in his hand, went to the doorway where the deceased had entered (T 208). Margaret Harrell also testified that at no time did she see the deceased with any weapon, and the only weapon of the deceased that she knew about was a pocketknife, about as long as your finger, which was in his pocket (T 211). The deceased never got out of the truck on the side towards the petitioner's house, or even took the key out of the ignition (T 214).

Alice Suggs, who was also a witness to the shooting, testified that she did not see the deceased with any weapon and that the deceased did not get out of the truck on the driver's side (T 269, 275).

Roberta Ware testified that after the shooting, the

deceased came into her apartment (T 448), and the petitioner came to the door and said, where is that s.o.b.? (T 450).

One Shelly Williams testified that she saw the deceased and his wife lying in the road and the petitioner with a gun in his hand pointing it at them (T 454).

Petitioner, himself, on cross-examination, testified that the deceased never got out the truck and he did not see any weapon in the deceased's hand (T 612), and Officer Walker, who participated in the investigation, said upon arriving at the scene he found the right-hand door of the truck open, but the left-hand door was closed (T 398, 492).

ARGUMENT

As to First Question:

In reply to petitioner's first question, it should be stated, at the outset, that the issue is a very simple one, and no amount of strange semantics can convert it into one warranting review by this Court on certiorari. Petitioner contends that he has been deprived of a substantial right, based upon real evidence, to have the jury fully instructed as to the law of Florida applicable to the charge. In support of this contention, he cites **Calton v. Utah,** 130 U.S. 83, 9 S.Ct.435 and **Bird v. United States,** 180 U.S. 356, 21 S.Ct. 403.

In the **Calton** case, supra, this Court held that the Territorial Court of Utah failed to instruct the jury, as provided for by statute, that even if they found

the defendant guilty of murder in the first degree, they could still recommend mercy, which would fix his penalty at life imprisonment instead of death.

In **Bird,** supra, the trial court merely instructed the jury regarding the defense of self-defense, that unless the jury found from the evidence that the killing was not in the necessary defense of defendant's life, or to prevent the infliction upon him of great bodily harm, he was guilty of murder. This Court held the instruction should have also included the language that if the defendant had reason to believe that the killing was necessary for the defense of his life, or to prevent the infliction upon him of great bodily harm, that he was not guilty.

In the instant case, we do not believe that it is contended by petitioner that the charge given was an incorrect statement of law, but only that it did not include the doctrine of non-necessity of retreat. The Court fully and completely instructed the jury in the instant case on the defense of self-defense based on the facts of the case including the testimony of petitioner, which can easily be seen by a cursory examination of the Court's actual instructions to the jury on self-defense (T 769-771 incl.).

It will be seen in our argument under question 2 that the courts of Florida have not failed to apply the law of Florida, thereby depriving petitioner of a substantial right and his liberty. We submit that the Florida court did, in fact, apply the applicable law under the situation as presented by the facts of the

case, and though petitioner has exhausted his state remedies, he was clearly afforded a fair trial.

As to Second Question:

The Decision of the District Court of Appeal of Florida, Fourth District, herein is not directly contrary to and in direct conflict with the decisions of the Supreme Court of Florida, nor with its own decision in another case. It should be noted, at the outset, that there is no conflict over the fact that the deceased never got out of the truck on the driver's side facing petitioner's home and onto petitioner's premises. The only conflict is whether or not he, in fact, opened the door on the driver's side of the truck. Actually, there is testimony to the effect that after petitioner fired three shots at the deceased, the petitioner then came around to the other side of the truck, where the deceased had alighted from, and fired two more shots while the deceased and his common-law wife were lying in the road. The trial court specifically inquired of counsel for the petitioner, during the trial at the instruction conference, whether or not there was any testimony that the deceased had actually started into the yard of the petitioner, and in view of the fact that deceased never stepped on petitioner's premises, the court declined to give the charge (T 641-643, 782).

Petitioner now contends that the case at bar is in conflict with **Hedges v. State,** (Fla. 1965) 172 So.2d 824; **Pell v. State,** (Fla. 1929) 97 Fla. 650, 122 So. 110; **Danford v. State,** (Fla. 1907) 43 So. 593; and **Watkins v. State,** (Fla. App. 1967) 197 So.2d 312.

In all of the cases above, the deceased was either actually in the home of the defendant, or on his immediate surrounding premises, with the exception of **Danford v. State,** supra. In **Danford v. State,** supra, the defendant was on his own premises, and the deceaseds were on a public road, and the Florida Supreme Court held it was not error to include in the charges to the jury the doctrine or duty of defendant to retreat if necessary or possible.

CONCLUSION

It is respectfully submitted that petitioner's application for Writ of Certiorari be denied.

Respectfully submitted,

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Tallahassee, Florida

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Counsel for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was mailed to the Honorable Errol S. Willes, 201 South Second Street, Fort Pierce, Florida 33450, and to the Honorable Raymond E. Ford, P. O. Box 3307, Fort Pierce, Florida 33450, Attorneys for Petitioner, this 20th day of October 1967.

FRED T. GALLAGHER
of Counsel